In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-788

JOSEPH GERNIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner and eight others were convicted of having conspired to violate 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for a term of fifteen years and fined $10,000. The court of appeals affirmed (Pet. App. 1a–5a).[1]

1. The evidence showed a large-scale conspiracy to import and distribute cocaine. The scheme involved transporting 21 kilograms of cocaine to New York

[1] The convictions of codefendants James Miller, Madeline Pineda, and Martin, Victor, and Enrique Hernandez were also affirmed; this Court denied certiorari on November 6, 1972 (Nos. 72-261 and 72-5292).

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aboard a Chilean ship (Tr. 374–379, 454). Upon arrival in New York on September 6 or 7, 1970, the cocaine was thrown off the ship by one of the conspirators and retrieved by a skindiver (Tr. 411–414, 426–442). The cocaine was then brought ashore and sold to the Hernandez brothers (Enrique, Martin, and Victor), who functioned as the middlemen to resell the cocaine to others (Tr. 455–465, 546–551, 967–969, 1014–1015). A subsequent shipment of 40 kilograms arrived in New York on November 5 or 6, 1970 (Tr. 557–559, 562–564, 871–881).

Petitioner functioned in the illicit scheme as a major customer of the Hernandez brothers. On October 17, 1970, after the arrival of the first and before the arrival of the second shipment of cocaine, Enrique Hernandez introduced petitioner to Mario Sepulveda (a coconspirator who testified for the government) as "his best customer" (Tr. 546–547). Hernandez told Sepulveda that because of prior commitments he had not sold to petitioner all of the cocaine received by him from the first shipment, but that petitioner would buy all of the cocaine that Hernandez received from the second shipment (Tr. 547).

Other evidence linking petitioner to the conspiracy included conversations intercepted by New York City Detective Frank Cruet, through a court-authorized wiretap on Enrique Hernandez's telephone. Tape recordings of conversations between Hernandez and petitioner on September 28, October 13, and Oc-

tober 29, 1970, were played to the jury (Tr. 1178–1187). Detective Cruet identified petitioner as the person speaking to Hernandez in the tapes (Tr. 1178, 1185). In addition, he explained, over defense objection, that a statement by Hernandez in one of the conversations—"I'm supposed to have twenty, twenty cents coming off"—meant that he would be receiving 20 kilos of narcotics (Tr. 1200–1201).

2. Petitioner's contentions relate solely to Detective Cruet's testimony regarding the intercepted conversations.

a. Petitioner argues that an insufficient foundation was established for Cruet's in-court identification of petitioner's voice on the tapes (Pet. 8–9). This contention was considered and properly rejected by the court of appeals in its opinion, upon which we rely (Pet. App. 3a). We point out in addition that *Pope* v. *United States,* 289 Fed. 312 (C.A. 3), relied upon by petitioner, is not in conflict with the decision of the court below. In *Pope* the only evidence implicating the defendant was a telephone call by a detective who "thought" he had spoken to the defendant. "The detective was not acquainted with her, had never seen her and did not know her voice" (289 Fed. at 315). On these facts the court held the evidence insufficient to support the conviction. Here, Detective Cruet made a positive voice identification. The court below properly held that, since the evidence showed a basis for Cruet's familiarity with petitioner's voice, Cruet's

credibility was properly a jury question. See *Hale* v. *United States*, 410 F. 2d 147, 151–152 (C.A. 5); *Espinoza* v. *United States*, 317 F. 2d 275, 276–277 (C.A. 9).[2]

b. Petitioner further contends that Cruet's testimony explaining the phrase "twenty cents coming off" as meaning that Hernandez would be receiving 20 kilos of narcotics invaded the exclusive province of the jury to interpret the evidence presented (Pet. 5–8). Since petitioner did not question Cruet's qualifications, based on extensive experience as a narcotics officer, to offer his opinion of the meaning of the phrase (Tr. 1202), the question facing the trial court was whether expert testimony explaining the phrase was needed. The phrase was one peculiar to the illegal narcotics trade and in that sense incomprehensible to the jury. Thus the trial court exercised permissible discretion in admitting Cruet's explanation of its meaning for the limited purpose of rendering the conversations intelligible to the jury. See *Parente* v. *United States*, 249 F. 2d 752, 754 (C.A. 9); cf. *White* v.

[2] Petitioner also relies upon Rule 901(b)(5) of the new Federal Rules of Evidence, which permit voice identification where the witness heard the voice "at any time under circumstances connecting it with the alleged speaker." As the court below pointed out (Pet. App. 3a), Detective Cruet acquired his familiarity with petitioner's voice after the conversations which were the subject of the identification. The Advisory Committee's Note to Rule 901 expressly approves subsequently acquired voice familiarity.

United States, 399 F. 2d 813, 819 (C.A. 8); *Fineberg* v. *United States*, 393 F. 2d 417, 421 (C.A. 9).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] Petitioner's reliance on *Walton* v. *Sherwin-Williams Co.*, 191 F. 2d 277 (C.A. 8), and *DeLoach* v. *United States*, 307 F. 2d 653 (C.A.D.C.), is misplaced. In *Walton* the court held that the experts who testified had been unqualified to give their opinion. As noted previously, petitioner has never questioned Cruet's qualifications as an expert on the vernacular of the narcotics trade. *DeLoach* condemned allowing a witness to give his personal conclusions as to what was meant by particular conversations of the defendant. Here, the trial court expressly excluded any such conclusions by Cruet (Tr. 1200). His testimony was limited to explaining particular words and phrases customarily used by narcotics traffickers.

We note also that Cruet's testimony would be admissible under Rule 701 of the new Rules of Evidence, which allows opinion testimony that is "rationally based on the perception of the witness" and "helpful to * * * the determination of a fact in issue."

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